Supreme Court, U.S.
FILED

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No._____

In The
Supreme Court of the United States

INDIAN CREEK CORPORATION
AND CURT DANIELS,
PETITIONERS

V.

STATE OF IOWA, ex rel., IOWA DEPARTMENT OF
NATURAL RESOURCES, 99 AG23542 AND

THE DISTRICT COURT OF JASPER COUNTY, IOWA,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE IOWA
DISTRICT COURT FOR JASPER COUNTY

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER U.S. CONSTITUTION AMENDMENT V, GUARANTEED RIGHTS TO PROPERTY, CAN BE DEPRIVED BY STATE ENVIRONMENTAL REGULATORS IN THE ABSENCE OF STATUTORY AUTHORITY AND IN CONTRADICTION TO LEGISLATIVE INTENT WHEN NO POLLUTION, ENVIRONMENTAL INSULT OR PUBLIC NUISANCE IS DOCUMENTED OR ALLEGED.

2. WHETHER U.S. CONSTITUTION AMENDMENT XIV, GUARANTEED RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW, CAN BE DEPRIVED BY STATE ENVIRONMENTAL REGULATORS IN THE ABSENCE OF STATUTORY AUTHORITY AND IN CONTRADICTION TO LEGISLATIVE INTENT WHEN NO POLLUTION, ENVIRONMENTAL INSULT OR PUBLIC NUISANCE IS DOCUMENTED OR ALLEGED.

3. WHETHER STATES CAN IMPOSE EXCESSIVE FINES IN VIOLATION OF THE PROTECTIONS GUARANTEED BY THE U.S. CONSTITUTION , AMENDMENT VIII

STATEMENT OF PARTIES

The caption of the case in this court contains the names of all parties to the proceedings in the lower courts. Indian Creek Corporation is a family farm corporation owned and directed by Curt Daniels.

CORPORATE DISCLOSURE STATEMENT

Indian Creek Corporation is not owned by a parent corporation and there is no publicly held company that owns any stock in Indian Creek Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Curt Daniels respectfully requests that the Honorable Justices of the Supreme Court of the United States grant a writ of certiorari to review the judgment of the District Court for Jasper County Iowa rendered on November 19, 2001. In support of this request the following is set forth.

OPINIONS BELOW

Finding of Fact, Conclusions of Law and Judgment was entered on November 19, 2001 following a bench trial on October 24-25, 2001 in the District Court for Jasper County, Iowa.

Motion to Set Aside Judgment was filed on December 3, 2001 and denied by the District Court for Jasper County, Iowa on December 14, 2001.

Notice of Appeal to the Iowa Supreme Court was filed on January 9, 2002. On its own motion of September 5, 2002 the Iowa Supreme Court ruled that the Appellants' (petitioners herein) Motion to Set Aside Judgment was untimely and issued an Order October 22, 2002 dismissing Appellants appeal.

Appellants (petitioners herein) subsequently filed a Petition for Writ of Certiorari to the Iowa Supreme Court on November 13, 2002, an Order was issued January 8, 2003 denying Appellants Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Judgment of the District Court for Jasper County, Iowa was entered on November 19, 2001. Appeal to the Iowa Supreme Court was dismissed on October 22, 2002. Petition for Writ of Certiorari to the Iowa Supreme Court was denied on January 8, 2003. It is from this final order of January 8, 2003 that Petitioner brings this Petition for Writ of Certiorari. The jurisdiction of this court is invoked pursuant to 28 USC Section 1257.

STATEMENT OF THE CASE

Petitioner's facilities complied with state statutory requirements and were issued required construction and operating permits at various times from 1970 to 1987. Contrary to Code of Iowa (IC) chapter 455B, Animal Feeding Operations, the Iowa Department of Natural Resources (DNR) held invalid Petitioners permits and demanded Petitioner reapply for construction and operating permits. The DNR demand that Petitioner reapply for all construction and operating permits was without state statutory authority; the clear legislative intent was that permits issued prior to rule changes were valid.

Petitioner's sole livestock watering well was by state legislative intent permitted by grandfathered provisions in statutory revisions, Iowa Administrative Code (IAC) 567 65.11(3), IC 455B. The DNR environmental inspector demanded that the well be plugged.

The legislature provided (Administrative Rules Committee 0733B) that livestock producers could continue to land apply manure until such time that the state could

approve manure management plans. (MMP's) The DNR inspector repeatedly interfered with Petitioners attempts to apply manure contrary to and in violation of the statutory provisions.

These are just two of many examples of the DNR placing requirements on the petitioners facility that were contrary to State Legislative Statute.

The facilities were leased to another producer so petitioner's efforts could be concentrated on the development of a munincipal-type manure treatment regimen. The lease provided for the lessee to manage the manure consistent with DNR regulations. This transfer of responsibility for manure management complied with the provisions of IAC 567-65.21, IC 455B (1999). Lessee's manure management was without pollution and releases. A release is defined as an actual, imminent or probable discharge of manure from an animal feeding operation structure to surface water, groundwater, drainage tile line or intake..., IAC 567-65.1 IC 455B. Lessee did experience some minor spill incidents that would similarly occur on any livestock farm. These minor infractions, spills, were charged against the petitioner.

Shortly after the initiation of the DNR demand that petitioner reapply for all construction and operating permits, seal the well, and provide for an in pit engineer evaluation, the state offered a consent decree to the petitioner. The essence of the consent decree was that all minor infractions, spills, would be excused without penalty if the petitioner would consent to complying with the DNR's demands to depopulate the livestock buildings, empty and clean all the pits, provide the in pit engineer evaluation and reapply for all construction and operating permits in 60

days. The consent decree provided that failure to comply would result in fines of up to $5000.00/day which were unappealable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioners were deprived of 5th Amendment property rights, due process and equal protection of the law guaranteed by the U.S. Constitution 14th Amendment and the imposition of excessive fines that are in violation of the 8th Amendments of the United States Constitution.

1. Deprivation of property rights in violation of the U.S. Constitution, Amendment V.

Petitioners construction, operating, and well permits were valuable and necessary property rights to utilize the facilities. Although the DNR did not physically appropriate the property nor take the property for public use the DNR's action was a "regulatory taking" in violation of U.S. Constitution guaranteed property rights. Tahoe-Sierra Preserv. v. Tahoe Reg. Planning122 S. Ct. 1465 (2002), 152 L.Ed.2d 517, 535 U.S. 302

Petitioner was ordered by the Iowa DNR to close permitted facilities and totally remove all waste and clean the storage structures and conduct an in pit engineer evaluation. Petitioner's facilities were of a commonly used design that when constructed did not contemplate total emptying and cleaning. These DNR demands were made in the absence of any pollution, represented a cost that would and did economically devastate Petitioner's operation and required risk to human life and health. Petitioner's request that a system of monitoring wells be installed at Petitioner's

cost to determine if pollution was occurring was initially accepted by the Iowa DNR as an alternative to totally emptying and closing the facilities. However, subsequent to the petitioner submitting a monitoring well plan proposed by Terracon, an engineering firm specializing in environmental assessments, the DNR demanded the in pit engineer evaluation in addition to implementation of the Terracon proposal.

The courts have held that those factors such as economic impact of the regulations, its interference with reasonable investment backed expectation, and the character of the governmental action have particular significance in determining if property rights have been violated. Citing authority, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2566; 477 U.S. 348; 91 L.Ed.2d 285 (1986).

This court has found that where regulation denies all economically beneficial or productive use of the land the Fifth Amendment is violated when the regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of this land" citing authority Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 120 LE2d 798, 505 U.S. 1003.

2. Deprivation of due process and equal protection of the law guaranteed by U.S. Constitution Amendment 14.

The trial court unjustly limited Petitioner's right to make a vigorous defense. The Petitioner was denied equal protection of the law and deprived of constitutionally guaranteed rights to property implicit in the 14th Amendment.

"Both liberty and property are specifically protected by the fourteenth amendment of the U.S. Constitution against any state deprivation which does not meet standard of due process." Giaccio v. State of Pennsylvania 86 S. Ct. 518, 520, 382 U.S. 399, 15 L.Ed.2d 447 (1966)

Although the state may be exempt when a land-use regulation substantially advances a legitimate state interest, e.g. environmental protection, the state is not exempt where, as here, there is no allegation of pollution, the facilities were within the statutes and the defendants were advocates of testing the well for pollution and installing monitoring wells to determine if the pits were leaking. "Assuming that the fourteenth amendment protections are qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States", Quoting Pennsylvania Coal Co. v. Mahon, 43 S. Ct. 158, 160; 260 U.S. 393; 67 L. Ed.322 (1922).

"In Justice Holmes' well known, if less than self defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far is will be recognized as a taking" quoting Pennsylvania Coal supra at p. 158; Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457; 533 U.S. 606; 150 L.Ed.2d 592 (2001)

The defendants have been denied both procedural and substantive fourteenth amendment due process guarantees. A substantive due process claim is based on the premise that the interference with property rights was "clearly arbitrary and unreasonable" in addition to "having no substantial relation to the public health, safety, morals or

general welfare". Citing authority Blumenthal Inv. v. City of Des Moines, 636 NW2d 255, 264 (Iowa 2001)

More importantly the trial court directed the petitioners to limit their defense to issues regarding minor alleged infractions, for example whether or not lagoon freeboard, freeboard is the distance between the water and top of the berm, was 1 inch out of compliance. Petitioner was cited by the DNR and subsequently fined $10,000.00 by the Trial Court for allegedly being one inch out of compliance when the inspector characterized the DNR's visual appraisal as approximate and plus or minus 10%.

The Trial Court totally misunderstood and / or misapplied the statutory scheme. For example, the count misinterprets the clear language of the statue regulating spray irrigation set back, the inspector failed to measure the distance from the property line to the irrigation nozzle which was required to document a violation when, by the states measurement, the spray pattern was 40 feet within the petitioners boundary line. 567 IAC 65.3(3)c IC 455B;

The DNR requested and the Petitioner agreed to totally empty and close-out a permitted lagoon. A five step plan with a diagram for the closure procedure was approved by the DNR. The plan provided for temporarily stockpiling the residual material on adjacent land prior to field application. The petitioner was fined by the Trial Court for stockpiling the residual in spite of the fact of the DNR approval and a State witness who testified that from what he saw "it was a pretty good plan".

These findings and judgment of the Trial Court deserved review by the State Appellate Court. The Iowa Supreme Court was completely briefed prior to dismissing

the appeal, certiorari was also rejected. The Petitioners were denied equal protection of the law. The purpose of the Equal Protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Village of Willowbrook v. Olech 120 S.Ct. 1073, 1075, 145 L.Ed.2d 1060, 528 U.S. 562 (2000).

3. Imposition of excessive fines in violation of the U.S. Constitution Amendment VIII

The Judgment of $95,000.00 individually upon the Petitioner is outrageous. The trial record is clear that the Petitioner worked diligently and spent substantial sums to comply with the demands of the DNR which were beyond statutory authority and arbitrary. The Trial Court looked to Section 309(d) of the Federal Clean Water Act, 33 U.S.C. 1319(d) for guidance; this statute has no bearing on the instant case because there was no discharge of pollutants into any waters, navigable or not. However, once the statute was cited as authority the court was obligated to follow the mandates set out in the statute for the imposition of a fine. This the trial court failed to do.

This statute provides that in determining the amount of a civil penalty for the discharge of pollutants into navigable waters of the United States the court shall consider the seriousness of the violation, the economic benefit resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may

require. The Trial Court cited U.S. v. Smithfield Foods, Inc., 972 F. Supp. 338, 344 (E.D. Va. 1997) as authority for imposition of the $95,000.00 judgment. However, Smithfield Foods exceeded permit limits for various pollutants from over 100% to 1000% and these pollutants were directly discharged into the Pagus River, a navigable water, for 6,982 days of total violation, Id. p. 353. Citing the egregious violations of Smithfield Foods as having some justification for the imposition of demands and penalties against the Petitioner is without merit. The $95,000.00 Judgment violates the 8th Amendment of the United States Constitution.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause [U.S. Constitution 8th Amendment] is the principle of proportionality: The amount of the forfeiture [fine] must bear some relationship to the gravity of the offense that it is designed to punish" U.S. v. Bajakajian 118 S. Ct. 2028, 2036, 524 U.S. 321, 141 L.Ed.2d 314 (1998). If the amount of the forfeiture [fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional Id. p. 2038.

PRESERVATION OF CONSTITUTIONAL ISSUES.

The DNR's petition and defendant's answer and pretrial brief were sufficiently clear to alert the district court to the Constitutional issues involved and to allow evidence on these issues. Additionally, the defendants requested in the Motion to Set Aside Judgment that the district court conduct proceedings to determine the validity of the accusations and demands of the DNR which precipitated these proceedings.

The defendants are not appealing the constitutionality of the Animal Feed Operations 567 IAC 65

(IC 455B) statutes but instead the defendants are appealing the unconstitutional application of these statutes under the color of statutory authority.

REASONS FOR GRANTING WRIT

Environmental regulation has become increasingly important in the United States. The public understands and is supportive of regulations to diminish or halt environmental degradation and improve the quality of life. Public support for environmental regulation is diminished when the regulations are seen as without scientific merit, haphazardly drafted and enforced and oppose an inspector's mistaken agenda against a citizen in the absence of state supervisory or judicial oversight. Agricultural pollution, especially livestock waste, is the recipient of increasing environmental regulation. However, the regulations and regulators activities must be reasonably calculated to respond to circumstances and events that effect the environment. It is imperative at this time of emerging environmental regulation to clarify the parameters of valid regulation prior to the continuation of a long and contentious history of abusive and non-productive regulatory application.

CONCLUSION

The allegations of the Iowa Department of Natural Resources were without merit, in excess of or in contradiction to statutory authority, and had no substantial basis in fact to support a judgment against the Petitioner. The oppressive pursuit by the DNR violated Petitioner's right to due process, equal protection of the law, and denied Petitioner property rights guaranteed by the Constitution of

the United States, and resulted in the imposition of excessive fines.

The current emphasis on environmental regulation at both the state and federal levels requires that the regulatory principals outlined in Pennsylvania Coal v. Mahon be reaffirmed. It is tantamount that the reasonable and necessary parameters of environmental regulation be defined as the country slips toward the intolerable conditions that existed on July 4, 1776. "He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance". The Declaration of Independence In, Congress, July 4, 1776.

No._____

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INDIAN CREEK CORPORATION
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V.

STATE OF IOWA, ex rel., IOWA DEPARTMENT OF
NATURAL RESOURCES, 99 AG23542 AND
THE DISTRICT COURT OF JASPER COUNTY, IOWA,
RESPONDENTS.

PROOF OF SERVICE

I, Curt Daniels, do swear or declare that on this date, MAY 31, 2003, as required by Supreme Court Rule 29 I have served three copies of the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served as follows:

Timothy D. Benton, PK1000349
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th Street, Room 018
Des Moines, Iowa 50319

Clerk of the Iowa District Court
Jasper County Courthouse
Newton, Iowa 50208

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 05/31, 2003

Curt Daniels

(signature)

IN THE IOWA DISTRICT COURT FOR JASPER COUNTY

STATE OF IOWA, ex rel., IOWA DEPARTMENT OF NATURAL RESOURCES, 99AG23542,	)	LAW NO. LACV110419
Plaintiff,	)	FILED 01 NOV 19 Jasper County, IA Clerk of District Court
vs.	)	
INDIAN CREEK CORPORATION and CURT DANIELS,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT
Defendants.	)	

On September 27, 2000, the plaintiff State of Iowa filed this suit against defendants Indian Creek Corporation and Curt Daniels. The State seeks the assessment of civil penalties and the issuance of a permanent injunction against the defendants for a variety of animal waste control violations allegedly committed at the defendants' hog confinement operation in Jasper County. Defendant Indian Creek answered on November 24, 2000.

This matter came before the Court for trial on October 24 and 25, 2001. Prior to trial, counsel for the State indicated that it would narrow its claims to six (6) alleged violations: failure to properly retain animal waste, failure to maintain adequate freeboard in the earthen manure storage basins, improper spray irrigation of manure, improper use of an uncertified manure applicator, failure to submit an acceptable manure management plan and failure to annually remove waste from an earthen manure storage basin. The

State also limited its request for injunction relief to only seek a permanent injunction ordering the defendants to remove accumulated waste from the remaining storage basin and below building pits. Trial was accordingly narrowed to these issues.

Assistant Attorney General Tim Benton appeared for the State of Iowa. Curt Daniels represented himself and Indian Creek Corporation. Mr. Daniels stated the he is an attorney licensed to practice law in the State of Iowa. The State called Julie Nelson and Wayne Gieselman of the DNR as its witnesses. The defendants called Vidas Stravinskas and Duane Bundy to testify. Curt Daniels also testified in narrative form. Several exhibits were also received. Having reviewed the evidence, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

At all times material to this case, Indian Creek Corporation, an Iowa corporation, owned and operated a confinement feeding operation for swine located in Section 29, T81N, R21W, Clear Creek Township, Jasper County, Iowa.[1] Curt Daniels is the sole officer and director of the corporation. Daniels directed all business activities of the corporation and had responsibility for all corporate decisions concerning manure at the Indian Creek site. (Daniels Deposition, 9/6/01, p. 154, lines 1-5.)

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[1]Apparently, Indian Creek Corporation no longer owns this site. Although no evidence was introduced on this point, counsel for both parties stated to the Court that a third party acquired a tax deed to the property in June, 2001.

Three buildings at the site had deep eight (8) foot pits for manure storage. Although no hogs are presently located at the site, waste remains in these pits. One earthen manure storage basin containing manure also remains at the site. There are four (4) other buildings at the facility with shallow pits which apparently have not been used for some time. At one point, the facility utilized three (3) earthen manure storage basins.

On September 23, 1998, Michael Murphy, Chief of the Compliance and Enforcement Bureau of the Iowa DNR, sent a letter to Indian Creek and Daniels because of continued problems at the site with manure management. (State's Exhibit 2.) The letter, inter alia, required the defendants to locate suitable and adequate land areas and apply all manure in the lagoons and pits within sixty (60) days in accordance with an approved manure management plan. Following this letter, Environmental Specialist Julie Nelson of the DNR conducted a series of inspections at the facility.

The defendants entered a written lease for the facility with Prairie Pork Inc., in April, 1999. (Defendant's Exhibit X.) Prairie Pork first placed its hogs at the facility in the fall of 1998. The lease provides that Prairie Pork had responsibilities for the manure, except to the extent the defendants elected to manage it.

In response to complaints concerning manure being hauled from Indian Creek to a location in Lucas County, Nelson inspected the site on October 1, 1998. Nelson first noticed that a contractor employed by the defendants, Jerry Van Ort, was closing what had formerly been an earthen manure storage basin west of the finishing buildings (west or solids settling basin). The contractor had breached the berm and was pushing the manure solids to the northwest. (State's Exhibit 3.) Manure liquids had flowed to the

northeast from the breach in the berm and were pooling in an open area. (State's Exhibit 4.)

After observing this operation, Nelson inspected the buildings. She detected a pool of manure outside one (1) of the finishing buildings, forty (40) feet long, twenty (20) feet wide and nine (9) inches deep. (State's Exhibit 5.) Nelson also inspected the south manure storage basin and noted that the freeboard was approximately 1 1/2 feet. Nelson based this conclusion on a visual observation of the basin; she did not use any measuring device. Nelson inspects 125 earthen basins per year for freeboard level and has done so since 1998.

After she had concluded her inspection, Nelson telephoned Curt Daniels to discuss her findings. Nelson informed him that she had observed inadequate freeboard and failure to retain waste. Daniels did not state in this conversation that the contractor had acted in excess of his authority in closing the basin.

On October 23, 1998, Nelson inspected the site and observed that manure was flowing from a confinement building. (State's Exhibits 6 and 7.) The burned vegetation in the vicinity of the manure indicates that the manure had been flowing for some time. Nelson also observed that the freeboard level in the south basin was less the two (2) feet. Again, Nelson did not use a measuring device to determine the freeboard level, but relied upon her visual observation.

Nelson inspected the south basin on January 20, 1999. She determined that the south basin had less then two (2) feet of freeboard based upon a visual observation of the basin. She also took a photograph purporting to show the freeboard level. (State's Exhibit 8.)

On April 22, 1999, Nelson inspected the site and observed waste seeping from one (1) of the confinement buildings. (State's Exhibits 9 and 10.) Again, the burned

vegetation in the area of the leakage demonstrates that waste had been leaking for some time.

Nelson was driving by the premise on August 6, 1999, when she observed spray irrigation taking place in a cornfield adjacent to a county road. The county road is south of the property, running east and west. Nelson entered the site and observed that the operator of the equipment was Jesus Sandoval, an employee of Indian Creek. Nelson testified that at the time of the application, Sandoval was not a certified manure applicator. Daniels admitted this fact in his (sic) measured the distance from the wetted perimeter of the manure applied to the edge of the county road. Pacing off the distance, Nelson measured forty (40) feet.

On September 23, 1999, Nelson arrived at the Indian Creek facility shortly after Jesus Sandoval had completed a manure application to a cornfield located where the west basin had formerly been used. The equipment was still dripping manure. Sandoval had begun to clean the equipment. Waste had run off the field and was pooled along a path or driveway between the north set of finishing buildings. (State's Exhibit 11.) Nelson also inspected the south basin and noticed that the freeboard was less than two (2) feet. (State's Exhibit 12.) At the time of this application, Jesus Sandoval was not a certified manure applicator. (Daniels deposition, 9/6/01, p. 110, lines 7-25; p. 111, lines 1-11.)

Nelson returned to the site on October 15, 1999, and again observed manure leaking out of a building. (State's Exhibit 13.) Subsequent visits on November 23 and November 30, 1999 also revealed waste leaking from the below building pits. On the latter visit, waste was also pooled on both ends of one (1) finishing building. There are no photographs documenting these observations introduced as exhibits.

On March 3, 2000, Nelson arrived at the site to observe the closure of the north basin. She found that closure had begun. Jerry Van Ort, a contractor again hired by the defendants, had breached the berm and was pushing manure solids to the southeast where the solids were piled. (State's Exhibit 14.) The waste was not piled on concrete. The remaining liquid in the basin was being pumped out to the west to a former cornfield. (State's Exhibit 15.) Neither Nelson nor anyone else at the DNR had authorized closure of the basin in this fashion.

The south basin remains at the site. The defendants have not completely emptied the basin since September 23, 1998, according to Nelson's testimony and admissions made by Daniels during his deposition. (Daniels Deposition, 9/6/01, p. 112, lines 19-25; p. 113, lines 1-25; p. 114, lines 1-9.) According to Wayne Gieselman's testimony, waste remains in the storage pits beneath the northern three (3) buildings. The defendants have not submitted and approved manure management plan since September 23, 1998. The DNR did approve a plan for the removal of waste at the site on January 16, 2001. (Defendants Exhibit T.) However, the plan itself stated that it was limited to a one-time proposal for removal of waste then at the site. Gieselman testified that it was only approved for that purpose and not the ongoing operation of the facility.

CONCLUSIONS OF LAW

The Plaintiff bears the burden to prove the alleged violations by a preponderance of the evidence. Iowa R. App. P. 14(f)(6). Preponderance of the evidence is evidence that is more convincing that opposing evidence. Iowa Civil Jury Instruction 100.3. The weight to be given any evidence is for the fact finder to decide. Iowa Civil Jury Instruction 100.4.

In this case, the State seeks civil penalties pursuant Iowa Code section 455B.191(1) and injunctive relief under

Iowa Code section 455B.191(4) for violations of statutes and rules pertaining to swine waste management in Iowa. Iowa's environmental statutes and rules are remedial in nature, and therefore are to be given a liberal and not a strict construction. State ex rel., Miller vs. DeCoster, 596 N.W.2d 898, 902 (Iowa 1999). Further, the provisions at issue call for strict liability, meaning that the prohibitions are not grounded in fault; the State need not prove negligence or fault. Id.

Preliminary Legal Issues

The defendants argue that the "filtrate" produced by their separation device is not manure. Therefore, the various regulations concerning spray irrigation or manure retention would not be applicable to their facility. 567 IAC 65.1 defines manure in pertinent part as, "animal excreta or other commonly associated wastes of animals." Other than the assertion that the liquid by-product has less nitrogen content, the defendants did not offer evidence to show why this filtrate does not meet the definition of manure. The State's expert, Wayne Gieselman, testified that in his opinion the filtrate remains manure, and the Court agrees.

The defendant also argues , at least as to the failure to retain and freeboard allegations, they were not responsible for the violations because the site had been leased to another party. The defendants assert that under the lease, the lessee was solely responsible for proper management of the manure. The Court is not persuaded by these arguments. The defendants also argue that the contractor is responsible for closure of the basins.

The statutory scheme and underlying public policy point to the defendants, as owners of the site, as legally responsible parties. The defendants had a construction permit for at least one (1) basin, and were responsible for submission of a manure management plan. The statutory

scheme imposes a duty on the facility owner. It would create a huge loophole, doing violence to the regulatory scheme, to interpret these provisions as allowing an owner to, in effect, contract away its statutory duties and avoid legal responsibility for manure management for the storage basins and buildings which it owns. The DNR may also have chosen to pursue the lessee as operator of the facility for certain of these violations, but the fact that it did not pursue such an action does not relieve the owner of responsibility.

Restatement (Second) of Torts, sections 410-429 (1965), states:

> One who by statute or administrative regulation is under duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safety or precautions.

The commentary to this section provides:

> The rule stated in this section applies whenever a statute or administrative regulation imposes a duty upon one doing particular work to provide safeguards or precautions for the safety of others. In such a case, the employer cannot delegate his duty to provide such safeguards or precautions to his independent contractor.

The statutes and administrative rules involved in this case constitute safeguards imposed upon the defendants as

owners of this facility. The Court concludes that these duties cannot be delegated.

In addition, the Court concludes that the defendants' actions were the proximate cause of the violations. The requirement of proximate cause is met upon proof that a defendant's conduct was a substantial factor in producing the violations and that the violations would not have occurred except for the defendant's conduct. Hagen v. Texaco Refining & Marketing, Inc., 526 N.W.2d 531, 537 (Iowa 1995) There is no merit to any contention that the actions of the contractor relieve the defendants of liability. The actions of Van Ort in breaching the berm on two (2) occasions were entirely foreseeable and within the scope of risk created by the defendants themselves. DeCoster, 596 N.W.2d at 903

Failure to Retain

Iowa Code section 455B.201 (1) states in part that , "A confinement feeding operation shall retain all manure produced by the operation between periods of manure disposal." More specifically, 567 IAC 65.2(3) provides in part: "The minimum level of manure control for a confinement feeding operation shall be retention of all manure produced in the confinement enclosures between periods of manure application." (Emphasis Supplied.) The State alleges eight (8) days in which the defendants violated this requirement: October 1, 1998, October 23, 1998, April 22, 1999, September 23, 1999, October 15, 1999, November 23, 1999, November 30, 1999, and March 3, 2000.

The State alleges that on October 1, 1998, this standard was violated through improper closure of an earthen storage basin because a contractor retained by the defendants breached the berm and pushed out the manure solids. Liquid waste was allowed to run off. Similarly, the

State asserts that the defendants failed to retain waste on March 3, 2000 by improperly closing the north basin in such a fashion as to allow waste to be pushed out of the storage structure and allowed to run off.

In addition, the State contends that on October 1, 1998, October 23, 1998, April 22, 1999, October 15,1999, and November 30, 1999 waste leaked or otherwise ran out of the pits beneath various buildings at the site. On September 23, 1999, waste apparently ran off a field and pooled along a roadway on the site.

As to the closure of the two (2) basins, the State's evidence consisted of Nelson's testimony, and photographic Exhibits 3, 4, 14 and 15. Gieselman testified that the DNR does not mandate a particular procedure to close basins, but that the procedures employed in this case on October 1, 1998 and March 3, 2000 would not be recommended. Gieselman testified that manure should be retained within the structure while the basin is emptied and not simply pushed off. The photographs demonstrate manure solids flowing outside the basins, and liquid manure pooling on the ground.

As to manure flowing form the pits underneath various buildings, and pooling at the site, the State's evidence consisted of Nelson's testimony and Exhibits 5, 6, 7, 9, 11 and 13. There were no photographs offered to prove violations on November 23 and November 30, 1999. The photographs introduced into evidence demonstrate manure outside the storage structures on the dates alleged.

The defendant did not introduce evidence contradicting the State's proof. The defendant offered one (1) witness, Vidas Stravinskas, who testified the he had applied Round-Up to weeds adjacent to the buildings. Even if this testimony were credible, it would only go the length of time the waste was allowed to pool outside the buildings, and not whether the manure was retained within the pits as required by law. The defendant also argued that the waste had been

retained because it did not leave the site. However, by its own terms, the regulation provides that manure must be retained within the storage enclosures.

The Court concludes that the State has proven by a preponderance of the evidence that the defendants violated Iowa Code section 455B.201(1) and IAC 65.2(3) on all the days alleged.

Freeboard

567 IAC 65.2(3) "b" also states, "Manure stored in unformed manure storage structures or earthen waste slurry storage basins shall be removed from the structures as necessary to maintain a minimum of two feet of freeboard in the structure." Freeboard is defined at 567 IAC 65.1 as the difference in elevation between the liquid level and the top of the lowest point of animal feeding operation structure's berm.[2]

The State alleges four (4) days in which adequate freeboard was not maintained: October 1, 1998, October 23, 1998, January 20, 1999 and September 23, 1999. All of these violations allegedly occurred at the south basin. The State's evidence consisted of Nelson's testimony and two (2) photographic exhibits. Exhibit 8 purports to show lack of freeboard on January 20, 1999, and Exhibit 12 purports to show lack of freeboard on September 23, 1999.

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[2]In its Answer to the petition, defendant Indian Creek raised the defense that the basins at the site had been permitted for one (1) foot of freeboard. However, defendants did not raise this issue at trial and Daniels subsequently admitted that two (2) feet is the proper depth. (Daniels Deposition, 9/6/01, p. 61, lines 1-19.)

Nelson testified that she relied on a visual observation to determine freeboard was inadequate and used no measuring device. The defendants attack these conclusion as unreliable. However, Nelson has conducted 125 basin examinations annually since 1998. Gieselman testified that visual observation can be adequate given the inspector's training and experience. The Court concludes that Nelson's observations were credible. Exhibits 8 and 12 also support the State's allegations. The Court concludes that the State has proven violations of 567 IAC 65.2(3)"b" on the days alleged.

Improper Spray Irrigation

Iowa Code section 455B.203B(2) provides that a person shall not apply manure by spray irrigation equipment except as provided by rules adopted by the DNR pursuant to chapter 17A. The DNR has adopted rules governing manure application by spray irrigation. 567 IAC 65.3(3)"c" states:

> Separation distance for spray irrigation from property boundary line. Spray irrigation equipment shall be set up to provide for a minimum distance of 100 feet between the wetted perimeter as specified in the spray irrigation equipment manufacturer's specifications and the boundary line of the property where the equipment is being operated. The actual wetted perimeter, as determined by wind speed and direction and other operating conditions, shall not exceed the boundary line of the property where the equipment is being operated. For property which includes a road right-of -way, railroad right-of-way or an access easement, the property boundary line shall be the boundary line of the right-of-way or easement.

567 IAC 65.1 defines "wetted perimeter" as the outside edge of land where the direct discharge of manure occurs from spray irrigation equipment.

The State alleges that the defendants violated this rule on August 6, 1999. According to Nelson's testimony she observed the defendant's employee Jesus Sandoval utilizing spray irrigation equipment to apply manure to a cornfield on the south side of the facility. Nelson paced off the distance from the wetted perimeter of the manure to the edge of the gravel road south of the site. The distance was forty (40) feet.

At trial, the defendants did not appear to dispute Nelson's measurement. Instead, defendants argued that the application did not violate the rule because the manure did not leave the property. Defendants rely on the sentence, "The actual wetted perimeter ... shall not exceed the boundary line of the property where the equipment is being operated." However, this argument ignores the plain language of the first sentence of the rule mandating a minimum distance of 100 feet between the wetted perimeter and the boundary line. Obviously the defendant's equipment was not set up to provide for this distance as required by the rule.

The Court concludes that the defendants violated 567 IAC 65.3 (3)"c" on August 6, 1999.

Improper Use of an Uncertified Manure Applicator

Iowa Codes section 455B.203A sets forth the certification requirements for commercial manure applicators and confinement site manure applicators. Under Iowa Code section 455B.171(7), a commercial manure applicator is a person who engages in the business of and charges a fee for applying manure on the land of another person. A confinement site manure applicator means a person who applies manure stored at a confinement site

other than a commercial manure applicator. Iowa Code section 455B.203A(1)(c). 567 IAC 65.19(1) provides that after March 2, 1999, a commercial manure applicator and a confinement site manure applicator shall not apply dry or liquid manure to land unless the person is certified.

The State asserts that on two (2) days, August 6 and September 23, 1999, an employee of the defendants applied manure at the Indian Creek site without being certified. Nelson testified that on these two (2) days she witnessed Jesus Sandoval applying manure, and subsequently determined that he was not certified. On August 6, 1999, Sandoval applied manure by spray irrigation. On September 23, 1999, Sandoval applied manure to a field west of the buildings. There is no dispute that Sandoval was an employee of the defendants, and that he was applying manure on those occasions. The defendant did not claim that any exemption to certification in 567 IAC 65.19(7) applied. The defendant argues instead that Sandoval did not speak or write English well enough to take the exam, and that Nelson had given permission for Sandoval to continue making applications until arrangements could be made for the examination to be taken in Spanish, or for Daniels to translate the exam to Sandoval. There is no support in the record for this assertion. Nelson, an inspector with the DNR, would in any case have no authority to waive the certification requirements.

The State has proven, by a preponderance of the evidence, that the defendants violated 567 IAC 65.19(1) on the days alleged.

Failure to Empty Earthen Manure Storage Basin

567 IAC 65.15(5) states that an earthen manure storage basin shall have accumulated manure removed at least once each year. The State alleges that the defendants

have failed to empty the remaining (south) basin since at least September 23, 1998. In the letter to the defendants of that date (State's Exhibit 2), the DNR directed the defendants to remove the waste from not only the earthen basins, but the concrete pits beneath the building as well. The purpose of this requirement, according to Gieselman's testimony, is to prevent the basin from overflowing and to preserve its structural integrity.

Nelson testified that during the course of her inspections of the site, May 1, 1998 through August 1, 2001, she did not observe that the south basin had been emptied. Daniels states in his deposition that the basin had not been emptied since approximately 1987. (Daniels Deposition 9/6/01, p. 112, lines 19-25; p. 113, lines 1-25; p. 114, lines 1-9.) Defendant does not appear to dispute the applicability of the rule, or the evidence indicating that it has not been emptied. The Court has previously discussed, and rejected, the defendant's argument that its lessee was responsible for manure management at the site. As owners of the site, and specifically owners of the earthen basin, the defendants are legally responsible for compliance with 567 IAC 65.15(5). Defendant appears to suggest that because the DNR had instructed him not to apply waste without a manure management plan he could not have removed the waste. The defendants cannot use their failure to comply with one requirement as and excuse to justify violating another requirement.

The regulation imposes an annual requirement. Therefore, commencing from September 23, 1998 up to the date of trial, the defendants have violated 567 IAC 65.15(5) three (3) times.

Failure to Submit an Acceptable Manure Management Plan

The State alleges that the defendants have failed to submit an approved manure management plan. Generally, under Iowa Code section 455B.203, the owner of a confinement feeding operation required to obtain a construction permit from the DNR is required to submit a manure management plan. The plan must indicate, inter alia, the land necessary for the application of manure from the site, manure nutrient levels and manure application methods. Iowa Code section 455B.203 (3). According to Gieselman's testimony, the purpose of the plan is essentially to insure that the confinement feeding operation has adequate land available to safely apply the manure generated at the facility.

The structures at the defendant's site in Jasper County were constructed prior to the adoption of the current law governing manure management plans. However, the operation may still be subject to the manure management plan requirement. 567 IAC 65.5(1) provides that the DNR may evaluate any animal feeding operation to determine, in part, whether manure from the operation is causing, or may reasonably be expected to cause pollution of a water of the state. If the DNR determines that this condition exists, it may require remedial action, including submission of a manure management plan. 567 IAC 65.5(2). State's Exhibit 2, informing the defendants that a manure management plan must be submitted for the Indian Creek site was authorized by these rules. Gieselman testified that the defendants have not submitted an approved plan.

The defendant argues that Defendant's Exhibit T constituted DNR approval of a manure management plan. The exhibit states by its own terms that is was intended to apply to a one time removal of waste from the site, to be

followed by a plan for the ongoing operation of the facility. Gieselman testified to this effect as well. The Court concludes that the defendants have not submitted an approved manure management plan in violation of 567 IAC 65.5. The Court further concludes that this constitutes one continuous violation dating from October 3, 1998, or ten (10) days after defendants were required to submit a manure management plan under the terms of the Murphy letter.

Penalty Assessment

Iowa Code section 455b.191 (1) states that any person who violates any provision of part 1 of division III of this chapter, or any rule issued under part 1 of division III shall be subject to a civil penalty not to exceed five thousand dollars for each day of such violation. There are no specific criteria to be used by the Court in determining civil penalties.

In Iowa Code section 455B.109 criteria are set out for the administrative assessment of penalties, which are as follows:

> 1. The cost saved or likely to by saved by non-compliance by the violator.
>
> 2. the gravity of the violation;
>
> 3.the degree of culpability of the violator; and
>
> 4. the maximum penalty authorized for that violation under this chapter.

The Court will consider these factors to the extent applicable. In addition, decisions of the federal courts construing civil penalty provisions under federal law many provide guidance to the Court. Section 309(d) of the Federal

Clean Water Act states that a defendant shall be subject to a civil penalty not to exceed $25,000.00 per day for each violation. 33 U.S.C. section 1319(d). The statute further provides that in determining the amount of a civil penalty the court shall consider the seriousness of the violation, the economic benefit resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. The Court believes that the need for deterrence must also be considered in arriving at a penalty.

The federal courts have consistently reasoned that the starting point for determining the civil penalty should be the statutory maximum which could be mitigated by the factors listed in section 309(d). U.S. v. Gulf Park Water Co., Inc., 14 F. Supp.2d 854, 858 (S.D. Miss. 1998). The Court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect. U.S. v. Smithfield Foods, Inc., 972 F. Supp. 338, 344 (E.D. Va. 1997).

In this case, the Court calculates the statutory maximum penalty to be $95,000.00. That is eight (8) days of violation for failure to retain ($40,000.00), four (4) days of freeboard violations ($20,000.00), one (1) day of improper spray irrigation ($5,000.00), two (2) days of illegal use of an uncertified manure applicator ($10,000.00), three (3) violations of the requirements to annually empty the earthen basin ($15,000.00) and one (1) violation of the manure management plan requirement ($5,000.00).

Starting from this point, the Court may consider any factors which mitigate this amount. The Court concludes that nothing in the record supports any mitigation of the statutory maximum. The violations were repeated on several occasions. There was no good faith effort to comply. Although the State has not alleged that any waste reached a

water of the state, and no proof was offered on this issue, that does not diminish the seriousness of these violations. Gieselman testified that the site is located in a flood plain area with a high water table. Gieselman also testified that it was likely that on several occasions waste had been leaking for several days based on the burned vegetation adjacent to the spillage. He further established through his testimony that manure allowed to pool outside storage enclosures poses a threat to the environment by either seeping through the soil or run off. The fact that no evidence was introduced to prove contamination does not mitigate the penalty. See Smithfield Foods, id.

The evidence established that, commencing from receipt of the Murphy letter, the defendants continued to violate the rules governing manure management. In terms of economic benefit realized through noncompliance, the Court can surmise that the defendants saved the expense of employing a properly certified manure applicator and the expenses associated with properly removing and land applying the waste. In sum, the defendants demonstrated willful disregard of the statutes and rules governing waste control at confinement feeding operations. The maximum penalty of $95,000.00 should be assessed.

The record establishes that Daniels directed all activities of the corporate defendant. Therefore, he is liable personally for these violations. The defendants are jointly and severally liable for these penalties.

Injunctive Relief

Iowa Code section 455B.191(4) provides that the Court may issue an injunction to obtain compliance with the statute or administrative rules. In seeking injunctive relief in this case, the State argues that the defendants remain in violation of the requirement that the earthen basin be

emptied. Although another party now owns the site, a past owner may be required to clean up condition which they have cause. Blue Chip Enterprises v. DNR, 528 N.W.2d 619, 624 (Iowa 1995). The Court agrees that injunctive relief is necessary to "obtain compliance" with this requirement. An injunction should issue requiring the defendants to remove waste remaining at the site.

IT IS THEREFORE THE ORDER OF THE COURT that a civil penalty in the amount of $95,000.00 is imposed against Indian Creek Corporation and Curt Daniels, individually.

IT IS THE FURTHER ORDER OF THE COURT that Indian Creek Corporation and Curt Daniels shall remove all accumulated waste from the earthen basin below building storage pits by December 15, 2001, and properly land apply the waste under the guidelines and supervision of the Iowa Department of Natural Resources.

Costs are assessed against the defendants.

Dated this 19th day of November 2001.

S/ J.W. JORDAN

J.W. JORDAN, Judge
Fifth Judicial District

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INDIVIDUALLY AND FOR
INDIAN CREEK CORPORATION
DEFENDANTS

IN THE SUPREME COURT OF IOWA
No. 02-41
Jasper County No. LACV1100419
ORDER

FILED
OCT 22 2002
clerk supreme court

STATE OF IOWA, ex rel.,
IOWA DEPARTMENT OF
NATURAL RESOURCES,
Plaintiff-Appellee,

vs.

INDIAN CREEK CORPORATION
and CURT DANIELS,
Defendats-Appellants.

This matter comes before the court, Carter, Cady, and Streit, JJ., participating, upon its September 5, 2002, order directing the parties to file jurisdictional statements addressing the timeliness of the defendants' appeal. The defendants have filed a statement and do not dispute the untimeliness of their 1.904(2) motion nor their subsequent notice of appeal. However, they ask their appeal be allowed to proceed in the interest of justice. The plaintiff has filed a statement requesting the appeal be dismissed as untimely.

An untimely rule 1.904(2) motion does not toll the time for filing an appeal. *See Nuzum v. State*, 300 N.W.2d 131, 134 (Iowa 1981). The thirty-day period for filing a notice of appeal ran on December 19, 2001, but the plaintiff's notice of appeal was not filed until January 9, 2002. An untimely appeal deprives the court of jurisdiction and requires its dismissal. *Ahls v. Sherwood/ Division of Harsco Corp.*, 473

N.W.2d 619, 621 (Iowa 1999). Accordingly, the defendants' appeal is dismissed.

Dated the 22nd day of October, 2002.

THE SUPREME COURT OF IOWA

By s/ M. J. Streit
Michael J. Streit, Justice

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Newton, IA 50208

IN THE SUPREME COURT OF IOWA
No. 02-1834
Jasper County No. LACV1100419
ORDER

FILED
JAN 08 2003
clerk supreme court

INDIAN CREEK CORPORATION and CURT DANIELS,
Plaintiffs,

vs.

IOWA DISTRICT COURT FOR JASPER COUNTY,
Defendants.

This matter comes before the court upon the plaintiffs' petition for writ of certiorari. Iowa R. App. P. 6.301. The State of Iowa, ex rel., Iowa Department of Natural Resources, the interested party below, has filed a resistance. Iowa R. App. P. 6.302. The petition for writ of certiorari is denied.

Dated the 8th day of January, 2003.

s/ M.J. Street
Justice, Supreme Court of Iowa

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IN THE IOWA DISTRICT COURT FOR JASPER COUNTY

		FILED 2003 FEB-3
STATE OF IOWA, ex rel.,	:	Jasper County, IA
IOWA DEPARTMENT OF		Clerk of District Court
NATURAL RESOURCES,	:	
99AG23542		LAW NO.
	:	LACV110419
PLAINTIFF, APPELLEE		
	:	IOWA SUPREME
vs.		COURT
	:	NO. 02-1834
INDIAN CREEK		
CORPORATION AND	:	NOTICE OF APPEAL
CURT DANIELS		
DEFENDANTS, APPLLANTS		

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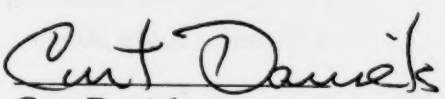
Notice is hereby given that the Defendants, Indian Creek Corporation and Curt Daniels, petition the Supreme

Court of the United States for a Writ of Certiorari to review the Findings of Fact, Conclusions of Law and Order of the Court, filed November 19, 2001, in the Iowa District Court for Jasper County.

You are further notified that the Petition for Writ of Certiorari will be filed on or before April 8, 2003 with the clerk of the Supreme Court of the United States in Washington D.C., as is provided by law and the rules of the United States Supreme Court.

Respectfully submitted,



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Original Filed

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Courtesy Copy:

Clerk of the Supreme Court
United States Supreme Court
1 First Street Northeast
Washington, D.C. 20543

CERTIFICATION OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal was sent by regular mail, postage prepaid to each party of record addressed as follows:

Timothy D. Benton
Assistant Attorney General
Environmental Law Division
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321 E. 12th Street, Room 018
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On January 30, 2003

Curt Daniels

Curt Daniels